BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARIA I. AMADOR	)	
Claimant	)	
	)	
VS.	)	
	)	
NATIONAL BEEF PACKING CO.	)	
Respondent	)	Docket No. **1,037,021**
	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the July 1, 2011 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on November 9, 2011. The Workers Compensation's Director appointed Jeffrey King of Salina, Kansas, to serve as Board Member Pro Tem in place of former board member Julie A.N. Sample.[1]

APPEARANCES

Thomas R. Fields of Kansas City, Kansas, appeared for the claimant. Shirla R. McQueen of Liberal, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant alleged she suffered repetitive trauma injuries to her right shoulder and neck. Respondent disputed claimant suffered work-related injuries and in the alternative argued any work-related injury would be limited to a scheduled disability. Respondent

[1] As of October 31, 2011, Ms. Sample has been replaced on the Board by Mr. Gary Terrill. However, due to a conflict, Mr. Terrill has recused himself from this appeal. Accordingly, Mr. King will continue to serve as a Board Member Pro Tem in this case.

further argued that if it was determined claimant suffered a whole body injury she would not be entitled to a work disability because her termination was the result of injuries she suffered in an intervening automobile accident. Respondent further argued that claimant was not entitled to unauthorized medical expense.

The Administrative Law Judge (ALJ) found claimant suffered injuries to her cervical spine as well as her right upper extremity. Consequently, claimant was awarded compensation for a 13 percent whole body functional impairment and, beginning December 24, 2009, a 55.5 percent work disability based upon a 100 percent wage loss and an 11 percent task loss. Claimant was also awarded the statutory maximum for unauthorized medical expenses.

Respondent requests review of the nature and extent of claimant's disability. Respondent argues claimant is limited to an award based upon a K.S.A. 44-510d scheduled disability. In the alternative, respondent argues if it is determined claimant suffered a K.S.A. 44-510e permanent impairment she would not be entitled to a work disability as the cause of her job loss is due to a non-occupational automobile accident. Finally, respondent argues the ALJ erred in awarding claimant reimbursement for unauthorized medical expenses in violation of K.S.A. 44-510h(b)(2).

Claimant requests the Board to affirm the ALJ's Award.

The issues for Board determination include the nature and extent of disability and whether claimant is entitled to reimbursement for unauthorized medical.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

In summary, the claimant was placed on light-duty work because of treatment she was receiving for her left hand. As she continued to perform repetitive work activities she developed pain in her right shoulder and neck. Claimant reported her problems to the plant nurses and she testified that they gave her pain medication for her neck but respondent referred her only for treatment for her shoulder.

Claimant filed a claim with respondent alleging injury to her right shoulder and neck. During the course of treatment for her shoulder claimant testified she complained of neck

pain but the treating physician denied she made any neck complaints. As the treatment for her shoulder was concluding claimant sought a second opinion and it was noted she had cervical complaints and treatment was recommended. Claimant was then in a non-occupational automobile accident and suffered injuries requiring surgery. Claimant denied she suffered additional cervical injury in the automobile accident and the hospital records do not reference neck complaints. As she received medical treatment for the injuries suffered in the automobile accident she never received treatment to her cervical spine but a patient questionnaire filled out for the doctor treating her back noted she had cervical pain since the date of the automobile accident. Claimant denied she made that statement and notes she cannot read or write English and did not fill out the questionnaire.

Claimant was off work for approximately a year after the automobile accident but when released to return to work she was only able to work for about a month and then took personal leave due to continuing problems from her injuries suffered in the automobile accident. When her personal leave expired respondent terminated her employment for failure to return to work on the scheduled date.

Scheduled or Whole Body Disability

The respondent's primary argument is that claimant's disability should be limited to a scheduled disability to her right upper extremity pursuant to K.S.A. 44-510d. This argument is premised on the fact that during her treatment for her injuries after a non-occupational automobile accident, the claimant gave inconsistent histories regarding the onset of and even whether she suffered neck pain.

It is significant to note that when claimant filed her application for hearing on October 15, 2007, she alleged not only a right upper extremity injury but also a neck injury. Claimant neither speaks, reads, nor writes English and all her interactions with physicians have been through interpreters. And claimant's shoulder and neck complaints began while she was on light duty because of surgery to her left hand. Consequently, claimant was receiving treatment including surgery for her left hand and for her right shoulder while also complaining of neck pain. However, the initial focus of treatment was on the problems with her upper extremities which required surgery.

Claimant testified that as she received treatment she told several of the physicians, including Dr. Suhail Ansari, that she also experienced neck pain. Dr. Ansari provided treatment for claimant's shoulder which included surgery and he noted that she did not complain of neck pain. As claimant's treatment for her shoulder was concluding, in April 2008, Dr. Pedro Murati examined claimant and diagnosed her with myofascial pain syndrome extending into the cervical paraspinals. Dr. Murati recommended additional medical treatment for that condition including physical therapy and cortisone trigger point injections.

But on June 3, 2008, claimant was in a roll-over automobile accident and she was thrown from the vehicle. She suffered a right hip fracture; left medial malleolar fracture; a pelvic fracture; a right knee non-displaced fracture; and, a T-12 compression fracture. Claimant denied she suffered additional neck injury and she did not receive any treatment for her neck as a result of the automobile accident.

As claimant received treatment for her injuries suffered in the automobile accident she saw several physicians and their reports differ regarding whether she mentioned neck pain. Claimant never mentioned neck pain to Dr. John Dickerson. Conversely, Dr. Amitabh Goel required a patient questionnaire which indicated that claimant had neck pain since the automobile accident. But again, claimant denied she filled out the questionnaire as she cannot read or write English. Obviously, the focus of her treatment after the automobile accident was on the significant injuries she suffered and not her neck. The matter was further confused by the fact that interpreters were involved and forms were filled out that claimant testified she had not seen.

The court ordered independent medical examiner, Dr. Terrance Pratt, equivocated on whether claimant's neck was injured at work but he finally determined:

> Q. (By Ms. McQueen) But I think right now we've got a little bit of what I perceive to be an inconsistency, and I just would like to know really, at the end of the day, which is it?
>
> MR. HERDOIZA: I'm going to object to the question. I think that's inappropriate.
>
> Q. (By Ms. McQueen) Okay. I'm sorry if you feel badgered, Dr. Pratt.
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> A. I'm -- m fine. May I answer freely?
>
> Q. Yes.
>
> A. Maybe we could resolve this. If she indeed reported that she had neck symptoms in relationship to a motor vehicle accident, then it would not be vocationally related. If she did not and there's some interpretation issue resulting in the error in the records, then it would be considered as vocationally related. That would be my opinion.[2]

Claimant testified that she did not injure her neck in the automobile accident and the records from her hospitalization after the automobile accident make no reference to a cervical injury. And claimant never received any treatment for her neck from any physician after the automobile accident. The ALJ analyzed the evidence in the following fashion:

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[2] Pratt Depo. at 63.

> The claimant alleged a right upper extremity injury and a neck injury when she filed her E-1 which was received by the Division of Workers Compensation on October 15th, 2007. Dr. Murati noted complaints of neck pain in his April 2008 report. It is clear that the claimant was alleging a work related injury involving her neck, prior to her motor vehicle accident in June of 2008. It is also clear that the claimant does have a neck injury and resulting impairment based on Dr. Pratt's opinion. Therefore, as a result of her accidental injury arising out of and in the course of her employment on January 22, 2007, the claimant suffers a 13% permanent partial impairment to her right upper extremity or an 8% whole person impairment and a 5% permanent partial impairment to the body as a whole for her neck condition.

The Board agrees and affirms. Claimant had neck complaints before the automobile accident. The medical records confirm that she never received treatment for her neck after the automobile accident which indicates that her cervical spine was not injured in that accident. Although the patient questionnaire from Dr. Goel's office indicates claimant suffered neck pain since the automobile accident, it is difficult to rely on that document as claimant clearly did not fill it out because she cannot read or write English.

As a result of her work-related accidental injuries, claimant has suffered permanent partial impairment to her right upper extremity as well as her neck. When a worker sustains both a scheduled injury as identified by K.S.A. 44-510d and an unscheduled injury, the Kansas Supreme Court has held that the worker's disability benefits are determined under K.S.A. 44-510e.

> K.S.A. 44-510d contains the schedule for compensation for certain permanent partial disabilities. . . . K.S.A. 44-510e covers compensation for permanent partial general disabilities, and thus covers those not included in the 44-510d schedule. If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.[3]

Consequently, the calculation of claimant's permanent partial disability benefits is governed by K.S.A. 44-510e.

Work Disability

After the non-occupational automobile accident claimant was off work from June 3, 2008, through approximately May 19, 2009. Claimant then returned to a job within her restrictions. But on June 15, 2009, claimant took a personal leave of absence due to hip

[3] *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

pain from the automobile accident. Ultimately, claimant was terminated on December 23, 2009, because she failed to return to work on the scheduled date and failed to request an extension of her personal leave.

Respondent argues claimant is not entitled to a work disability because her loss of employment was due to the intervening automobile accident and not her work related injuries.

As previously noted, the calculation of claimant's permanent partial disability benefits is governed by K.S.A. 44-510e, which provides, in part:

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Bergstrom,*[4] the Kansas Supreme Court, determined that a claimant's work disability is calculated, pursuant to K.S.A. 44-510e(a), by averaging the claimant's postinjury wage loss percentage with the claimant's task loss percentage. And the reason for the claimant's postinjury wage loss is irrelevant.

In *Tyler*,[5] the Kansas Court of Appeals stated: "Our Supreme Court's direction in *Bergstrom* could not be clearer. Absent a specific statutory provision requiring a nexus

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[4] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 1, 2, 214 P.3d 676 (2009).

[5] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

between the wage loss and the injury, this court is not to read into the statute such a requirement."

In *Osborn*,[6] the Court of Appeals reversed the Board's imputing of a post-injury wage where it was determined the claimant failed to make a good-faith job search. Respondent argued the case was factually distinguishable from *Bergstrom* because the claimant in *Bergstrom* was directed to stop working by a physician whereas the claimant in *Osborn* voluntarily quit an accommodated job. Further, the respondent argued there must be a causal connection between the wage loss and the injury. The Court of Appeals rejected both arguments, noting there is nothing in K.S.A. 44-510e that permits the factfinder to impute a wage. Citing *Bergstrom* and *Tyler*, the Court of Appeals reiterated that there is no requirement for a claimant to prove a causal connection between the injury and the job loss.[7]

The Board finds that the Kansas appellate courts have spoken on the nexus requirement and the reasons for claimant's wage loss are not relevant to the determination of work disability under K.S.A. 44-510e. Claimant will not be limited to her percentage of functional impairment after she was terminated from her employment with respondent. The ALJ's finding that claimant has a 100 percent wage loss and is entitled to an award of permanent partial disability compensation based on work disability is affirmed.

Neither party disputed the ALJ's determination that claimant suffered an 11 percent task loss and the Board affirms that finding which results in a 55.5 percent work disability.

Unauthorized Medical Expense

K.S.A. 44-510h(b)(2) states:

> Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

Respondent argues that claimant is in violation of the statutory prohibition against using the unauthorized medical examination allowance to obtain an impairment rating.

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[6] *Osborn v. U.S.D. 450*, 2010 WL 4977119, Kansas Court of Appeals unpublished opinion filed November 12, 2010 (No. 102,674).

[7] See also *Guzman v. Dold Foods, LLC.*, 2010 WL 1253714, Kansas Court of Appeals unpublished opinion filed March 26, 2010 (No. 102,139).

Respondent cites *Deguillen*[8] in support of its position. In *Deguillen*, the claimant consulted Dr. Pedro Murati for an examination as to necessary treatment recommendations. Later, the claimant's attorney requested a rating opinion from Dr. Murati based on the information obtained at the initial examination. A second examination was not conducted by Dr. Murati. The Court ruled that this was an attempt by the claimant to circumvent the statute by artificially separating the examination from the requested rating report, thus gaining the advantage of the $500 allowance for a prohibited purpose. The Court held that, in order for an unauthorized medical examination to be eligible for the reimbursement under K.S.A. 44-510h(b)(2), no impairment rating based upon that examination may be made a part of the record. The Court acknowledged that an employee's physician cannot provide an impairment rating without doing an examination. It is the use of the unauthorized medical allowance to pay for the prior examination and that examination then being used as the basis for the rating that results in the unauthorized medical allotment being used for an improper purpose.

Here, Dr. Murati conducted two separate examinations. The first was for the purpose of determining claimant's injuries, the cause of those injuries, the need for restrictions and the treatment required to alleviate those injuries. The statute prohibits none of those activities on the part of the health care provider. The only ratings provided by Dr. Murati were after the second, totally separate examination. The Kansas Court of Appeals in *Deguillen* denied the claimant the unauthorized medical allowance because Dr. Murati was asked to provide an impairment rating based on the prior examination. The Court held that "in order for an unauthorized medical examination to be eligible for reimbursement under K.S.A. 2006 Supp 44-510h(b)(2), no impairment rating based upon that examination may be made a part of the record, upon penalty that the examination expense may not be reimbursed."[9]

The Board addressed the *Deguillen* issue in *Roets.*[10] In *Roets*, the claimant's expert, Dr. Edward Prostic, performed an evaluation for the purposes of determining the need for additional medical treatment. The unauthorized medical allowance was requested for that examination. Dr. Prostic examined claimant a second time for the purpose of providing an impairment rating. No request was made to use the unauthorized medical allowance for this examination. The Board distinguished *Deguillen* from *Roets*, finding in *Roets* that Dr. Prostic performed separate examinations for the purpose of determining the need for medical treatment as opposed to the request for an impairment rating. The use of separate examinations distinguished *Roets* from *Deguillen*. The current matter is on

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[8] *Deguillen v. Schwan's Food Manufacturing, Inc.*, 38 Kan. App. 2d 747, 172 P.3d 71 (2007), *rev. denied* 286 Kan. 1177 (2008).

[9] *Id*. at 756.

[10] *Roets v. Molded Fiber Glass Construction Products*, No. 1,024,365, 2009 WL 1996464 (Kan. WCAB June 30, 2009).

point with *Roets* and, thus, distinguishable from *Deguillen*. The Board finds that the determination by the ALJ that claimant is not in violation of the prohibitions contained in K.S.A. 44-510h(b)(2) is affirmed. Claimant is entitled up to the maximum unauthorized medical allowance.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[11] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated July 1, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Thomas R. Fields, Attorney for Claimant
Shirla R. McQueen, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

[11] K.S.A. 2010 Supp. 44-555c(k).